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No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1986

HELEN K. DYKES,
Petitioner,

vs.

NATIONAL GYPSUM COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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February 26, 1987

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QUESTIONS PRESENTED

1. Did the Court of Appeals violate plaintiff's right to a jury trial, U.S. CONST. Amend. VII, or to due process of law, U.S. CONST. Amend. V, by setting aside a judgment upon a jury verdict for punitive damages assessed against one defendant because the amounts previously paid in settlement by several codefendants exceeded the verdict for both compensatory and punitive damages, where there was no evidence from which any liability of the settling defendants for punitive damages could be determined?

2. In setting aside plaintiff's judgment for punitive damages because of amounts paid by settling codefendants, did the Court of Appeals err in applying state appellate court decisions concerning compensatory, rather than punitive damages where the former are the common liability of all defendants for the injury they have caused while the latter are private fines assessed only against those defendants found guilty of reprehensible conduct?

LIST OF PARTIES

Petitioner Helen K. Dykes and Respondent National Gypsum Company were the only parties having an interest in the proceedings below.

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No.

In the Supreme Court of the United States

OCTOBER TERM, 1986

HELEN K. DYKES,

Petitioner,

vs.

NATIONAL GYPSUM COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner Helen K. Dykes respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled proceeding on September 15, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported at 801 F.2d 810, and is reprinted in the appendix hereto, p. 1a, *infra*.

The Memorandum and Order of the United States District Court for the Eastern District of Tennessee, Northern Division (Porter, S.J.) has not been reported. It is reprinted in the appendix hereto, p. 23a, *infra*.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit reversed the judgment of the District Court in awarding petitioner punitive damages against respondent on September 15, 1986, p. 1a, 46a, *infra*, denied petitioner's petition for rehearing and suggestion for rehearing *en banc* on November 3, 1986, p. 48a, *infra*, and denied respondent's petition for rehearing on January 16, 1987, p. 49a, *infra*. The jurisdiction of this Court to review the decision of the United States Court of Appeals is conferred by 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

UNITED STATES CONSTITUTION:

Amendment VII - Civil Trials

In suits at common law, where the value in controversy shall exceed twenty dollars [$20.00], the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

Amendment V - Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process; Just Compensation For Property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any

person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

TENNESSEE CODE ANNOTATED:

The Uniform Contribution Among Tort-Feasors Act, T.C.A. §§29-11-101 *et seq.*, is set out verbatim in the Appendix p. 50a.

STATEMENT OF THE CASE

This action was originally brought in the United States District Court for the Eastern District of Tennessee by Eulis S. Dykes and his wife, petitioner Helen K. Dykes, against Raymark Industries, Inc., respondent and 14 other defendants for damages caused by asbestos disease contracted by Mr. Dykes as a result of his use of and exposure to asbestos-containing products manufactured and sold by the defendants. Jurisdiction of the District Court was invoked under 28 U.S.C. §1332(a)(1) because of diversity of citizenship, plaintiffs being citizens of the State of Tennessee and all defendants being corporations incorporated under the laws of, and having their principal places of business in states other than Tennessee.

Mr. Dykes died before trial from malignant mesothelioma, a cancer of the pleural lining of the chest caused by inhaled asbestos fibers, and petitioner Helen K. Dykes was substituted as plaintiff for his surviving claim. All defendants except respondent and United States Gypsum Company settled with petitioner before the receipt of any

evidence at the trial. United States Gypsum settled near the mid-point of the trial. The various amounts paid in settlement totaled $503,725.00. P. 5a, *infra*.

During the trial, petitioner introduced evidence of the culpability of respondent which both the trial court and the Court of Appeals held was sufficient to justify an award of punitive damages against it. P. 7a, 12a-20a, 37a-40a, 45a, *infra*. See also introduced evidence of respondent's wealth, financial condition and ability to pay.

The trial resulted in a judgment for petitioner against respondent in the amount of $100,000.00 in compensatory damages for her claim of loss of services and consortium, $200,000.00 in compensatory damages for Mr. Dykes' survival action and $200,000.00 for punitive damages. P. 5a, 23a, *infra*.

Both parties filed various post-trial motions including respondent's motion for a new trial, for judgment n.o.v. on the award of punitive damages and for a reduction in the amount of the judgment by the amounts which had been paid by the settling codefendants. The trial court then entered a final order striking the award of compensatory damages, as required by T.C.A. §§29-11-102(a)(b) and 29-11-105(a)(1), p. 50a, 52a, *infra*, because the amount was exceeded by the amounts plaintiff had received from the prior settlements, and denying all the other motions. P. 33a-37a, *infra*. It left the award of punitive damages intact finding that none of the prior settlements "contemplated apportionment of part of the amount paid for punitive damages," that "an award of punitive damages levied specifically against a lone defendant [could not] be considered the responsibility of any other defendants" and that "the punitive award herein was directed solely to National Gypsum." P. 35a-37a, *infra*.

Respondent appealed on several grounds, and the Court of Appeals held that the award of punitive damages was also subject to set-off by the amounts paid in settlement by the codefendants and reversed the trial court on that ground while affirming on all others. Like the trial court, it held the right of contribution was available to the defendant because it was not an "intentional tortfeasor" specifically denied the right under the version of the Uniform Contribution Among Tortfeasors Act, 12 U.L.A. 63 *et seq.*, adopted by Tennessee. T.C.A. §29-11-102(c), p. 50a, *infra*. It recognized that punitive damages are apportioned in Tennessee, but contrary to the trial court's findings, held that the damages awarded in this case were the responsibility of all of the defendants because

> Here we do not know the nature of the conduct of the settling codefendants so any attempt to apportion damages must be speculative at best.

P. 11a [3], *infra*. It did not consider the fact that punitive damages are not awarded as payment for an injury, but the entire opinion is based on a contrary belief.

REASONS FOR GRANTING THE WRIT

The published Opinion of the Court of Appeals is a leading case on contribution for punitive damages among cotortfeasors. All available authority including analogous and related cases from other jurisdictions, the theory of and policy justifying the award of such damages, and even the Uniform Act upon which the lower court attempts to base its decision dictate a contrary result.

In its most glaring mistake, the Court of Appeals decided that since there was no evidence in the record of the degree of culpability of the settling defendants "any

attempt to apportion damages must be speculative at best." Its ultimate holding, that the punitive award is the common liability of all defendants and subject to the principles governing contribution among tortfeasors, must be founded upon the assumptions of fact that all of the defendants acted in concert with respondent and that all were equally culpable, or it defies logic. But these assumptions clearly require a degree of speculation greater than any which the lower court might have sought to avoid. Section I, *infra.*

In basing its entire holding upon the inference that all types of *obligations* arising from anything other than intentional misconduct are subject to the principles of contribution merely because *parties* who are guilty of such conduct are specifically denied the right to seek contribution the lower court uses an obvious non sequitur as its only "legal" basis for setting aside plaintiff's verdict. It is respectfully submitted that such a clear fallacy does not constitute any reason at all. Section II, *infra.*

The law and policy of Tennessee regarding punitive damages is similar in all relevant respects to that of every other jurisdiction in which they are allowed and in which they are apportioned among codefendants in tort cases. Section III, *infra.* Several states still require a single verdict for punitive, as well as for compensatory damages and hold them to be the joint and several liability of all the defendants against whom it is rendered. Even cases from those jurisdictions, however, furnish no support for the lower court's holding that a judgment for punitive damages against one tortfeasor should be reduced by the amounts of prior settlements. *E.g., Ratner v. Sioux Natural Gas Corp.*, 719 F.2d 801 (5th Cir. 1983), p. 14-15, *infra.*

Apportionment, however, appears to be the majority rule because it is consistent with the principle that pu-

nitive damages are assessed as private fines or punishment for the wrongful acts and motives of the individual tortfeasor. *See, Huckeby v. Spangler,* 563 S.W.2d 555, 559 (Tenn. 1978) (citing cases from 16 jurisdictions apportioning punitive damages and indicating that the list is not exhaustive) and *Cheek v. J.B.G. Properties, Inc.,* 28 Md. App. 29, 344 A.2d 180, 189-190 (1975) (finding apportionment to be the majority rule). And it is uniformly held that a reduction by the amounts of prior settlements can only be made to a judgment, or that portion of a judgment, against a nonsettling defendant which could not have been apportioned. *E.g., Mack v. Garcia,* 433 So.2d, 17 (Fla. 4 D.C.A. 1983); *Neveroski v. Blair,* 141 N.J. Super. 365, 358 A.2d 473, affirmed 70 N.J. 185, 358 A.2d 473 (1976).

The laws pertaining to contribution among tortfeasors in Tennessee are likewise similar to those of all other states which allow it, whether by statute or judicial decision. Section III, *infra.* The distinction as to whether or not "intentional" or "willful and wanton" tortfeasors are denied the right of contribution, upon which the lower court's decision turned, is not relevant to a determination of whether punitive damages represent a "common liability" of all codefendants "for the same injury." T.C.A. §§29-11-102 (a)(b), p. 50a, 52a, *infra. Ratner,* p. 14-15, *infra,* was decided under the laws of Texas, the contribution statute of which does not expressly exclude tortfeasors guilty of either type of conduct. Vernon's Ann. Civ. Stat. Art. 2212.

The Tennessee Supreme Court has recently recognized that the lower court previously committed the same error in *Cunningham v. Underwood,* 116 F. 803 (6th Cir. 1902), as it has done here, *i.e.,* in applying the rules limiting the plaintiff to one recovery of compensatory damages to a

verdict for punitive damages. *Huckeby v. Spangler,* 563 S.W.2d 555, 558 (Tenn. 1978). Subdivision [4] of the Court of Appeals' decision, p. 11a-12a, *infra,* relies entirely upon the rules and cases dealing with compensation to the plaintiff rather than punishment of the wrongdoer. The several quotations from reported cases clearly and patently conflict with the corresponding established principles, policy considerations and the law regarding punitive damages. Section III p. 13, *infra.*

Until *Huckeby* was decided, *Cunningham* had retained considerable vitality as authority for the erroneous proposition that a jury must bring in a single verdict for punitive damages for which all defendants would be held liable. The lower court's decision in this case will have a much wider-reaching and more detrimental effect.

I.

In disturbing the jury's award of punitive damages without any legal reason, the Court of Appeals has denied plaintiff all benefit of her right to a jury trial guaranteed under the Seventh Amendment to the United States Constitution.

The jury found that petitioner was entitled to $300,000.00 as compensation for the actual damages she had suffered. It also found respondent liable for an additional $200,000.00 in punitive damages because of its own reprehensible conduct. Petitioner had obtained $503,725.00 from prior settlements of her claims against respondent's codefendants, and it is not disputed that, under the "one recovery rule", Section III p. 11-12, *infra,* this total amount was available to respondent as a credit against any verdict for compensatory damages which the jury might have returned.

To hold that the award of punitive damages must also be reduced by the amounts of the prior settlements, the Court of Appeals must have found as a fact that $203,725.00 was paid by respondent's codefendants for their possible liability for punitive damages rather than being based upon the conventional pretrial estimates and negotiations regarding the worth of plaintiff's compensatory claims. It also must have found as a fact that this liability arose solely from their participation in the same outrageous conduct as respondent and in concert with it. *Ratner v. Sioux Natural Gas Corp.*, 719 F.2d 801 (5th Cir. 1983), p. 14-15, *infra;* T.C.A. §29-11-102(b), p. 50a, *infra.* If any of these facts were not actually true, then respondent's liability for punitive damages could not be "common" with that of the settling codefendants. Such factual determinations are peculiarly the function of the jury, *See, e.g., Barry v. Edmunds,* 116 U.S. 550, 6 S.Ct. 501, 29 L.Ed. 729 (1885), and the lower court would have clearly invaded its province by explicitly assuming them to be true.

But all of the evidence in the record of conduct justifying the punitive damage award reflects only the independent actions taken by respondent in concealing the hazards which it knew existed with respect to its products and in falsely representing them to be safe. There is no evidence of any concert of action, nor any indication that respondent's codefendants could have been found liable for punitive damages at all. In such a situation,

> [I]t is . . . familiar appellate procedure that where the correctness of the lower court's decision depends upon a determination of fact which only a jury could make but which has not been made, the appellate court cannot take the place of the jury.

S.E.C. v. Chenery Corp., 318 U.S. 80, 88, 63 S.Ct. 454, 459. 87 L.Ed. 626, 633 (1942).

From its statement that "[h]ere, we do not know the nature of the conduct of the settling codefendants so any attempt to apportion damages must be speculative at best," the lower court apparently recognizes that *none* of the facts essential to its decision can be found in the record. It cannot tell whether any codefendant might have committed acts which could make it liable for punitive damages at all, much less whether such acts were connected in any way with those of respondent; but it sets aside the jury's verdict nevertheless.

The right to a jury trial guaranteed by the Seventh Amendment is obviously meaningless if an appellate court has the unlimited power to arbitrarily disturb the jury's verdict as the lower court did here. Although the trial court apparently had some reservations regarding the size of the compensatory award, p. 32a-33a, *infra*, and might have reached a contrary decision regarding plaintiff's motions if it could have anticipated the Court of Appeals' action, the judgment rendered does not even allow the District Court to grant a new trial now.

II.

In its judgment, the Court of Appeals exceeds its jurisdiction and denies plaintiff her right to due process of law guaranteed by the Fifth Amendment to the United States Constitution.

As shown in the proceeding section, the judgment of the lower court must have been based upon findings of fact which it was not empowered to make under the Seventh Amendment and which is acknowledges cannot be found in the record. In the absence of these facts, the holding has no logical basis and is unlawful.

The legal basis of the decision, p. 8a-10a, *infra.*, that all types of *obligations* arising from anything other than intentional misconduct are subject to reduction by the amounts previously paid in settlements by cotortfeasors is a conclusion which clearly neither follows from or is related to the sole premise from which it is derived, *i.e.*, that *parties* guilty of intentional misconduct are specifically denied the right of contribution.

> No judgment of a court affords due process of law if rendered without jurisdiction. A judgment is void for want of due process where the court exceeds its jurisdiction, as where it renders a judgment *not authorized by the* pleadings, *evidence or findings, . . . or without any judicial determination of the facts which alone can support it.*

16D C.J.S. *Constitutional Law*, §1170 (emphasis added).

The judgment of the Court of Appeals in this case, being unsupported by any legal principle or factual determination is "arbitrary and capricious" and lacks any foundation of procedural due process.

III.

The Court of Appeals' Opinion constitutes a leading decision based upon incorrect principles which will provide erroneous guidance to other courts. In establishing a rule which benefits tortfeasors guilty of reprehensible conduct who refuse to settle, it violates the principles and policies upon which punitive damage awards are based.

It is universally held that a plaintiff is entitled to only one recovery of compensatory damages. Thus, if one of several tortfeasors responsible for a single, indivisible

injury is sued, an award of damages designed to compensate the plaintiff for that injury must be reduced by any amounts which the plaintiff has received in settlements from other tortfeasors. In some jurisdictions the jury is allowed to consider these amounts in reduction of its verdict while in others, such as Tennessee, the trial court reduces the judgment by any such amounts upon defendant's motion. 25 C.J.S. *Damages*, §§3, 98(2). This general rule is codified in the Uniform Contribution Among Tort-Feasors Act, T.C.A. §29-11-105, p. 52a, *infra*.

> There are recognized limits to the general rule, and it only applies in determining actual damages for which all tortfeasors are equally liable.

25 C.J.S. *Damages*, §98(2), p. 1009

This limitation restricting the principles of contribution to damages "for the same injury to person or property" and to only the "common liability" therefor is also codified in the Uniform Act. T.C.A. §§29-11-102(a), (b), p. 50a, *infra*.

Solely because the Tennessee version of the Act specifically excludes intentional tortfeasors from the right of contribution, rather than those guilty of only willful and wanton misconduct the Court of Appeals holds that respondent has a right of contribution for the amount of punitive damages assessed against it. P. 7a-10a, *infra*. It summarily dismisses the fact that the award is not the responsibility of any other tortfeasors, as the trial court correctly states, and it disputes the well-established principle that the award was not made as payment "for the same injury to person or property" as was caused by the co-defendants. Punitive damages, by definition, are not awarded as payment for any injury at all. *See, e.g., City*

of Newport v. Fact Concerts, Inc., 453 U.S. 247, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981).

> The theory of punitive damages is not to compensate an injured plaintiff for personal injury or property damage, but to punish a defendant, to deter him from committing acts of a similar nature and to make a public example out of him.

Huckeby v. Spangler, 563 S.W.2d 555, 558-559 (Tenn. 1978).

The Court of Appeals states that "distinctions between the *nature* of conduct of joint tortfeasors does not preclude a finding of joint liability" and continues by stating the established rule of joint and several liability of joint tortfeasors for compensatory damages. P. 11a, *infra*. It completely ignores the fact that the cited authority does not deal with punitive damages and that such damages, are, in fact, based entirely upon the "*nature* of the conduct" of those liable for compensatory damages. It is uniformly held that if punitive damages are awarded against any defendant there must be evidence in the record of the culpability of his conduct sufficient to support such an award. *See, e.g., Huckeby v. Spangler*, 563 S.W.2d 555, 560 (Tenn. 1978). Here, as the lower court acknowledges, there was no such evidence as to any of the other co-defendants.

The Court of Appeals states that "[t]he requirement of common liability focuses on the combined effect of the several acts and not upon the nature of the conduct of the several actors," p. 12a, *infra*, the "combined effect" referring to the indivisible injury, but

> punitive damages are not based upon the nature and extent of the injury so much as upon the oppression exercised by the party who does the injury, and the

> basis therefore is not compensation for special injury, but punishment for the *mala fides* of the party doing the injury.

Schwab v. Internatl. Assn. of Bridge, Structural & Ornamental Iron Workers, 482 S.W.2d 143 (Tenn. App. 1972).

While compensatory damages represent the common liability of all tortfeasors who contribute to the same injury,

> [a] large number of states have adopted the rule that punitive damages may be apportioned either by awarding varying amounts of damages or awarding damages against some of the defendants but not others.

Huckeby v. Spangler, 563 S.W.2d 555, 559 (Tenn. 1978). This opinion approves earlier Tennessee cases in which punitive damages were apportioned and also finally disposes of *Cunningham v. Underwood*, 116 F. 803 (6th Cir. 1902). *Id.* p. 558.

Even where a verdict for punitive damages is held to be the joint and several or "common liability" of all the defendants against whom it is rendered, it is not usually reduced by the amounts of prior settlements. In *Ratner v. Sioux Natural Gas Corp.*, 719 F.2d 801 (5th Cir. 1983), the trial court held four defendants, consisting of two corporations and two individuals who owned and controlled them, jointly and severally liable for both compensatory and punitive damages. The corporations were in bankruptcy, and any unsatisfied judgment against them would only affect innocent creditors. The acts justifying the award of punitive damages were personally committed by the two individual defendants who settled with the plaintiffs shortly before the appeal was argued.

The Court of Appeals for the Fifth Circuit held that under these circumstances the award of punitive damages could be set-off by the amounts by which the settlement exceeded the compensatory damage award, but it emphasized that this result was based upon and limited to the peculiar factual situation involved rather than upon any basis of the "common liability" of all defendants. In its opinion, it states what had been generally accepted as the correct rule of law in such a case before the decision of the Sixth Circuit here:

> Nevertheless, the rationale of the "one satisfaction" rule is usually inapposite to punitive damages. The purpose of the rule is to ensure that a plaintiff receives no more than full compensation for his loss. (Citations omitted). A plaintiff awarded punitive damages has been given the right to receive more than "one satisfaction". The award of punitive damages is unconcerned with compensation; it is intended to punish the wrongdoer and to deter the commission of similar offenses in the future. (Citations omitted). To further the objectives of punishment and deterrence, it is more important that a defendant pay for his wrongdoing than that the plaintiff receive the payment. *Dobson v. Camden*, 705 F.2d at 769-70.

Ratner, supra, p. 804.

Here, the settling codefendants attempted to pay their pro rata share of the estimated "worth" of the case in compensatory damages and, possibly, also to cover whatever exposure to punitive damages each felt might exist as to it individually. The respondent, however, having a similar opinion as to the amount of compensatory damages which might be assessed, could hardly afford not

to go to trial. It was almost a certainty that it would have to pay nothing in compensation, and its liability for punitive damages might be reduced because of the size of the prior settlements if it were able to get a decision such as that rendered by the Court of Appeals. At this point, it will have to pay nothing for the reprehensible conduct of which it was found guilty, and the Court of Appeals' decision will likely make settlements with *all* tortfeasors in every such case very difficult if at least one is represented by astute counsel.

As in this case, the failure to settle with only one of several defendants still results in a complete trial of the entire matter involved. The Court of Appeals' decision, therefore, will promote and encourage court litigation of cases which might involve punitive damages, whereas the threat that such damages might be awarded had heretofore encouraged settlements of such cases.

CONCLUSION

For these several reasons, this petition for certiorari should be granted. There appears to be no decision from any other Circuit involving a civil lawsuit which so far departs from the accepted and usual course of judicial proceedings as to give rise to the constitutional questions addressed herein, and the exercise of this Court's powers of supervision are called for in this case.

Respectfully submitted,

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February 26, 1987

APPENDIX

Helen K. DYKES, Individually and Widow for the Use and Benefit of Her and Next of Kin of Eulis S. Dykes, Deceased, Plaintiff-Appellee,

v.

RAYMARK INDUSTRIES, INC., Pittsburgh Corning Corporation, W.R. Grace Co., Defendants.
National Gypsum Company,
Defendant-Appellant.

No. 84-5606.

United States Court of Appeals,
Sixth Circuit.
Argued Sept. 19, 1985.
Decided Sept. 15, 1986.

Widow brought asbestos case against asbestos manufacturer. The United States District Court for the Eastern District of Tennessee, David S. Porter, J., entered judgment against manufacturer, and manufacturer appealed. The Court of Appeals, Engel, Circuit Judge, held that: (1) punitive damages could properly be set off against payments made by defendants who settled before verdict; (2) evidence of manufacturer's conduct occurring after decedent's last exposure to asbestos, as well as deposition of unavailable expert, were admissible on issue of punitive damages; (3) admission of exhibit with portions highlighted and marked "Admitted for punitive damages only" was not reversible error; and (4) "overkill doctrine" did not apply to bar punitive damages.

Affirmed in part, reversed in part, and remanded.

1. Contribution (Key) 5(3)

Tennessee Contribution Among Tort-Feasors Act denies contribution to intentional joint tort-feasor. T.C.A. § 29-11-102(a-c).

2. Contribution (Key) 5(5)

Finding of joint liability does not require identical standards of conduct on part of tort-feasors; contribution, if otherwise permissible, is available to joint tort-feasors as long as injury is caused by concurrent, albeit independent, conduct. T.C.A. § 29-11-102(a-c).

3. Federal Civil Procedure (Key) 2195

Punitive damages award could not be apportioned where all but one defendant settled with plaintiffs prior to verdict.

4. Contribution (Key) 5(5)

Distinctions between nature of conduct of joint tort-feasors does not preclude finding of common liability for contribution purposes. T.C.A. § 29-11-102(b).

5. Damages (Key) 63

Punitive damages award against joint tort-feasor whose conduct was found to have been willful and wanton could properly have been set off against payments made by defendants who settled with plaintiffs before verdict. T.C.A. § 29-11-102(a-c), 29-11-102(b).

6. Evidence (Key) 578

Fact of being "predecessor in interest," for purpose of admissibility of former testimony of unavailable witness,

is not limited to legal relationship, but is also to be determined by whether party against whom the testimony was offered in prior proceeding had opportunity and similar motive to develop testimony by cross-examination. Fed.Rules Evid.Rules 403, 804(b)(1), 28 U.S.C.A.

See publication Words and Phrases for other judicial constructions and definitions.

7. Federal Civil Procedure (Key) 1437

Preferred approach in determining admissibility of former testimony of unavailable witness is for attorneys to present to the court, and for court to consider, circumstances under which original deposition was taken, so that full understanding of motives in the first case can be obtained. Fed.Rules Evid.Rules 403, 804(b)(1), 28 U.S.C.A.

8. Federal Civil Procedure (Key) 2011

It is incumbent upon counsel objecting to admissibility of former testimony of unavailable witness to explain as clearly as possible to judge precisely why motive and opportunity of defendants in first case was not adequate to develop cross-examination which instant defendant would have presented to the witness. Fed.Rules Evid. Rules 403, 804(b)(1), 28 U.S.C.A.

9. Federal Civil Procedure (Key) 1437

Trial court's admission of deposition of unavailable expert witness who testified in prior proceeding against alleged "predecessor in interest" of defendant in asbestos case was not an abuse of discretion, since much of defendant's argument pointing to areas of difference between its situation and that of predecessor in interest was not presented to district court, defendant did not state precisely what lines of questioning it would have pursued

had it had the opportunity, and the testimony was not so much opinion testimony as testimony relating to unchallenged historical facts concerning development of specialized subject matter. Fed.Rules Evid.Rules 403, 804(b)(1), 28 U.S.C.A.

10. Negligence (Key) 130(1)

Relevance of postinjury evidence to defendant's culpability is to be determined on case-by-case basis. Fed.Rules Evid.Rule 401, 28 U.S.C.A.

11. Damages (Key) 179

Admission of documents created after last possible date on which plaintiff was exposed to asbestos, to bolster claim that defendant in asbestos suit suppressed information about asbestos dangers and was therefore liable for punitive damages, was not an abuse of discretion, in view of district court's conclusion that attitude consistent with that claimed existed prior to the injury. Fed.Rules Evid. Rule 401, 28 U.S.C.A.

12. Federal Courts (Key) 896, 904

Admission of voluminous exhibits, with portions which were read to jury during trial highlighted in yellow marker, and sending exhibits into jury room marked "Admitted for punitive damages only," was not reversible error, in asbestosis case. Fed.Rules Evid.Rule 1006, 28 U.S.C.A.

13. Damages (Key) 87(1)

"Overkill doctrine," which holds that successive compensatory awards are sufficient to achieve exemplary and punitive purpose, so that allowing successive punitive awards only creates overkill and threatens recovery of any award by subsequent plaintiffs, did not apply, under Ten-

nessee law, to bar recovery of punitive damages in asbestosis cases.

See publication Words and Phrases for other judicial constructions and definitions.

Erma G. Greenwood (Lead), John T. Buckingham, Kramer, Johnson, Rayson, McVeigh & Leake, Knoxville, Tenn., Lawrence T. Hoyle, Jr. argued, Hoyle, Morris & Kerr, Philadelphia, Pa., for defendant-appellant.

Michael Y. Rowland argued, Rowland & Rowland, Knoxville, Tenn., for plaintiff-appellee.

Before ENGEL and KRUPANSKY, Circuit Judges; and PECK, Senior Circuit Judge.

ENGEL, Circuit Judge.

National Gypsum Company appeals a judgment entered against it after a jury awarded plaintiffs $300,000.00 in compensatory damages and $200,000.00 in punitive damages for injuries suffered by Mr. Eulis Dykes from exposure to asbestos-containing products while on the job. Jurisdiction is premised upon diversity of citizenship and Tennessee law controls. Eulis and Helen Dykes, husband and wife, filed suit against sixteen companies engaged in the manufacture and sale of asbestos products. With the exception of National Gypsum, all defendants settled with plaintiffs prior to the verdict for a total of $503,725.00. In the final judgment entered in this case the jury award against National Gypsum was reduced to $200,000.00 after the district court applied Tennessee's Contribution Among Tort-Feasors Act, Tenn.Code Ann. §§ 29-11-101 to -106 (1968), and completely set off the compensatory award. The trial court allowed the punitive award to stand, however, upon

a finding that the equitable remedy of contribution is not available to parties whose conduct was willful and wanton.

On appeal National Gypsum challenges the following four rulings made by the district court: (1) Tennessee's Contribution Among Tort-Feasors Act does not apply to punitive damages, (2) evidence of National Gypsum's conduct occurring after Mr. Dykes' last exposure to asbestos as well as the deposition of Dr. Kenneth Wallace Smith were admissible on the issue of punitive damages, (3) an exhibit marked "For punitive damages only" and sent into the jury room was not prejudicial, and (4) the "overkill" doctrine does not apply to bar punitive damages in asbestosis cases.

I.

Eulis Dykes worked as a plasterer at Gilbert Plastering Company in Knoxville, Tennessee, from 1947 through the mid-1960's. He used the spray gun method of applying plaster which involved using an applicator attached to a hose immersed in liquid plaster. The acoustical plaster he used in some of his work contained asbestos. The district court expressly found that on several occasions Mr. Dykes was exposed to Gold Bond Sprayolite, an acoustical plaster manufactured by National Gypsum. Mr. Dykes left National Gypsum around 1965 and became a utility mechanic at Union Carbide. His work at Union Carbide included some plastering as well as the replacement of asbestos pipe insulation and asbestos boiler linings. The trial court found that Mr. Dykes' last possible exposure to asbestos was in 1967, and this finding is not challenged on appeal. He left Union Carbide in 1982 after he was diagnosed as suffering from mesothelioma, a form of chest cancer associated with the inhalation of asbestos. Mr.

Dykes died from complications of his disease in November 1983, shortly after the present suit was filed in the district court.

II.

All of National Gypsum's contentions made on this appeal challenge legal and factual rulings made by the trial court on issues bearing on punitive damages. There is no challenge made to the award of compensatory damages nor is there any cross appeal by plaintiffs challenging the application of the contribution statute to the compensatory award. Because we conclude that the trial court improperly ruled that Tennessee's Contribution Among Tort-Feasors Act does not apply to punitive damages although the award of such damages was otherwise supported by the evidence, we reverse the denial of defendant's motion to amend the judgment as it relates to the punitive award and affirm in all other respects.

A. *Applicability of Tennessee's Contribution Among Tort-Feasors Act to punitive damages.*

In 1968, the Tennessee legislature adopted, with revisions, the Uniform Contribution Among Tort-Feasors Act, 12 U.L.A. 63 (1955). Tennessee had recognized prior to 1968, however, the equitable remedy of contribution. *See Davis v. Broad Street Garage,* 191 Tenn. 320, 232 S.W.2d 355 (1950); *Huggins v. Graves,* 210 F.Supp. 98 (E.D.Tenn.1962), *aff'd,* 337 F.2d 486 (6th Cir.1964). Tennessee's version of the Uniform Act provides a right of contribution in favor of a tortfeasor who has paid more than his pro rata share of a common liability when two or more persons are jointly or severally liable therefor. Tenn. Code Ann. § 29-11-102(a), (b). Tennessee's version of the Uniform Act does not expressly exclude punitive

awards. The district court below relied upon a perceived "fundamental inequity in permitting a defendant who has been adjudged guilty of wanton conduct to wholly escape damages because its codefendants early assessed their exposure and chose to enter into settlements" in denying contribution for punitive damages under the Act to National Gypsum whose conduct in this case was found by the jury to have been willful and wanton. *Dykes v. National Gypsum* Co., No. 3-83-382, slip. op. at 15 (E.D.Tenn. May 29, 1984).

Tennessee's Act does exclude from its coverage tortfeasors who are guilty of intentional conduct which has caused an injury. Section 29-11-102(c) provides, "There is no right of contribution in favor of any tortfeasor who has intentionally caused or contributed to the injury or wrongful death." Tenn.Code Ann. § 29-11-102(c). Intentional conduct is the only standard of conduct expressly excluded from the remedy.

National Gypsum argues that the Tennessee legislature intended to deny contribution to a tortfeasor whose intentional conduct contributed to a common liability and that punitive damages awarded for willful and wanton conduct—although they are a penalty—were not intended to be excluded from coverage by the Act. The Tennessee courts are constrained to give effect to the legislative intent of the statute under review where that intent can be ascertained. *Oliver v. King*, 612 S.W.2d 152 (Tenn. 1981). In *Oliver*, the Supreme Court of Tennessee stated, "Legislative intent and purpose is [sic] to be ascertained primarily from the ordinary meaning of the entire act for statute, without any forced or subtle construction to limit or expend [sic] the import of that language." 612 S.W.2d at 153 (citations omitted).

[1, 2] The least forced interpretation of the language in section 29-11-102(c) is that it is intended to exclude damages for intentionally caused injury only. We cannot conceive any reading of the Act which suggests by the words used by the legislature an intent to exclude conduct falling short of intentional. This reading is supported by the language in section 29-11-102(a) which defines the right of contribution in Tennessee and sets forth the only other exceptions for persons liable for a common injury, i.e., parties who are immune from a claim by the injured party. With this exception section 29-11-102(a) applies to two or more persons who are jointly or severally liable in tort. This section makes no distinction between the standards of conduct of the joint tortfeasors.[1] The only distinction made in Tennessee's Act with respect to standards of conduct is made in section 102(c) and applies to intentional wrongdoing only. Therefore, we find persuasive National Gypsum's argument that the Tennessee legislature only intended to deny contribution to an intentional joint tortfeasor.

In adopting the Contribution Among Tort-Feasors Act the Tennessee legislature altered the common law which held that tortfeasors guilty of willful and wanton conduct could not avail themselves of the contribution remedy. *See Davis v. Broad Street Garage,* 191 Tenn. 320, 232 S.W.2d 355 (1950). While courts presume that legislatures are aware of judicial decisions on issues concerning legislation under their consideration, *see, e.g., Cannon v. University of*

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1. A finding of joint liability does not require identical standards of conduct on the part of the tortfeasors. As long as the injury is caused by concurrent albeit independent conduct, contribution if otherwise permissible is available to the joint tortfeasors. *Velsicol Chem. Corp. v. Rowe,* 543 S.W.2d 337, 342-43 (Tenn.1976). *See also* Restatement (Second) of Torts § 886A comment b (1977).

Chicago, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979), we have here more certain evidence of a legislative intent to apply the Act to damages for willful and wanton conduct. The Uniform Act offers the various states the option of applying contribution to damages for willful, wanton and intentional conduct or to intentional conduct only. The Tennessee legislature chose the latter option. Section 1(c) of the Uniform Act provides, "There is no right of contribution in favor of any tortfeasor who has intentionally [willfully or wantonly] caused or contributed to the injury or wrongful death." 12 U.L.A. 63. The Commissioners' comments to this section explain their reasons for suggesting the option. "Brackets have been placed around the words 'willfully or wantonly' so that they may be omitted in those states where by definition of the terms they mean something less than they imply and where by including them the bar of the remedy may be too broad." *Id.* at 65. Although neither party has proffered any explanation of why the legislature omitted willful and wanton conduct, a decision by the Tennessee legislature to adopt the Commissioners' reasoning would have been a rational one. Punitive damages are awardable under Tennessee law for conduct "involving fraud, malice, gross negligence or oppression . . . or where a wrongful act is done with a bad motive or so recklessly as to imply a disregard for social obligations. . . ." *Island Container Corp. v. March*, 529 S.W.2d 43, 45 (Tenn.1975). This is the standard charged by the trial judge in the present case and is indeed sufficiently broad to give pause to consider taking damages for all conduct within its reach out of the remedy. This is a legislative rather than a judicial judgment, and we are bound by the clear legislative intent since we have ascertained it.

[3] Mrs. Dykes contends that punitive damages, unlike compensatory ones, are awarded separately against each tortfeasor and the amount for which each is liable varies according to his culpability and ability to pay, relying on *Huckeby v. Spangler,* 563 S.W.2d 555 (Tenn. 1978). The *Huckeby* case is an apportionment case and confirms the rule in Tennessee that punitive damages are private fines and may be awarded against some but not all defendants by the trier of fact. The crucial distinction, however, is that in *Huckeby* all defendants went to trial so that the evidence of the conduct of all of them was before the jury, allowing the jury to make an informed judgment as to the culpability of each of them. The present case is for contribution rather than apportionment of damages. Here, we do not know the nature of the conduct of the settling codefendants so any attempt to apportion damages must be based on pure speculation at best.

[4] Mrs. Dykes further argues that the punitive damages award was not based upon a common liability as defined in section 29-11-102(b). That section provides that the right of contribution exists "only in favor of a tortfeasor who has paid more than his pro rata share of the common liability. . . ." However, distinctions between the *nature* of conduct of joint tortfeasors does not preclude a finding of common liability.[2] Where the tortious acts of two or more wrongdoers combine to produce an indivisible injury "all of the wrongdoers will be held jointly and severally liable for the entire award and the injured party may proceed to judgment against any one separately or against all in one suit." *Velsicol Chem. Co. v. Rowe,* 543 S.W.2d 337, 343 (Tenn.1976) (citing *Landers v. East Texas Salt Water Disposal Co.,* 151 Tex. 251, 248

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2. *See supra* note 1.

S.W.2d 731, 734 (1952)); *see also Michie v. Great Lakes Steel*, 495 F.2d 213 (6th Cir.1974). The requirement of a common liability focuses on the combined effect of the several acts and not upon the nature of the conduct of the several actors. Therefore, we find Mrs. Dykes' argument based upon lack of a common liability unpersuasive.

[5] We therefore disagree with the district court that the punitive award cannot be set off against the payments made by the settling codefendants. If the trial court otherwise found this case to be proper for the award of punitive damages, then the award may be set off by the amount contributed by the settling codefendants.

B. *Sufficiency of evidence of punitive damages.*

Punitive damages are available under Tennessee law for conduct "involving fraud, malice, gross negligence or oppression . . . or where a wrongful act is done with a bad motive or so recklessly as to imply a disregard for social obligations. . . ." *Island Container Corp. v. March*, 529 S.W.2d at 45. Mrs. Dykes attempted to meet this standard by establishing that National Gypsum was aware of the dangers of asbestos exposure during and after her husband's exposure but did nothing to protect or inform employees of those dangers. She also attempted to establish that National Gypsum suppressed studies and reports documenting the risks associated with asbestos exposure. The parties do not dispute the trial court's finding that the last possible year in which Mr. Dykes was exposed to asbestos is 1967.

National Gypsum challenges in particular the admission by the trial court of two items: the deposition of Dr. Kenneth Wallace Smith, the medical director of the Johns-Manville Corporation from 1953 to 1966, and documents

concerning asbestos risks executed by officials at National Gypsum after 1967.

Dr. Kenneth Wallace Smith joined Canadian Johns-Manville in 1942 as a medical officer, became medical director there in 1946 or 1947, corporate director in 1951, and in 1953 he became the medical director for Johns-Manville Corporation. He held that post until 1966. Dr. Smith was deposed on January 13, 1976, in relation to the case *DeRocco v. Forty-Eight Insulation, Inc.*, Nos. 7880, 7281 (Pa.Ct.Common Pleas, Allegheny County 1974). The entire deposition was read into the record before the jury in the present case.

National Gypsum objects to the admission of Dr. Smith's testimony on the ground that it is hearsay, and is inadmissible former testimony under Rule 804(b)(1) which provides:

> (b) **Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> > (1) **Former testimony.** Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

Fed.R.Evid. 804(b)(1).

There is no dispute that Dr. Smith's deposition was not previously offered by or against National Gypsum. Ab-

sent these circumstances, former testimony of an unavailable declarant is admissible only if National Gypsum can be said to be a "predecessor in interest" to Johns-Manville, against whom the deposition was originally offered.

The Sixth Circuit addressed this same issue with respect to *this same deposition* in *Clay v. Johns-Manville Sales Corp.*, 722 F.2d 1289 (1983). There, the issue was whether Dr. Smith's deposition was admissible against Raybestos-Manhattan, which likewise was not a party in *DeRocco.*

In *Clay,* our court speaking through Judge Edwards adopted the Third Circuit's construction of Rule 804(b)(1) and the following language:

> While we do not endorse an extravagant interpretation of who or what constitutes a "predecessor in interest," we prefer one that is realistically generous over one that is formalistically grudging. We believe that what has been described as "the practical and expedient view" expresses the congressional intention: "if it appears that in the former suit a party having a like motive to cross-examine about the same matters as the present party would have, was accorded an adequate opportunity for such examination, the testimony may be received against the present party." Under these circumstances, the previous party having like motive to develop the testimony about the same material facts is, in the final analysis, a predecessor in interest to the present party.

722 F.2d at 1295 (citing *Lloyd v. American Export Lines, Inc.*, 580 F.2d 1179, 1185 (3d Cir.), *cert. denied*, 439 U.S. 969, 99 S.Ct. 461, 58 L.Ed.2d 428 (1978)).

[6] In a more recent decision, *Murphy v. Owens-Illinois, Inc.*, 779 F.2d 340 (6th Cir.1985), our court, speak-

ing through Judge Kennedy, upheld the exclusion of the same deposition of Dr. Smith involved in *Clay* and involved here when it was offered to show the state of the art against a manufacturer which withdrew from the asbestos product market in 1953. We there held that although the company was a predecessor in interest under Rule 804(b)(1) and *Clay*, the admissibility of Dr. Smith's deposition must still be subject to the balancing test of Rule 403, Fed.R.Evid. 403, to determine whether its relevance was outweighed by its prejudicial effect. Since in *Murphy* we agreed with the district judge that the particular circumstances were different from those in *Clay*, we upheld his exclusion there of Dr. Smith's deposition. Judge Kennedy for the court in *Murphy* recognized as *stare decisis* the continuing viability of *Clay*. She characterized its holding as having "collapsed the two criteria, i.e., whether the defendant was a predecessor in interest, and whether he had an opportunity and similar motive to develop the testimony by cross-examination into one test." 779 F.2d at 343. We view the net effect of *Clay* and *Murphy* as holding that in our circuit the fact of being a predecessor in interest is not limited to a legal relationship, but is also to be determined by the second aspect of the test under the rule: whether the defendant had an opportunity and similar motive to develop the testimony by cross-examination. In the instant case, the record shows that the trial judge was familiar with *Clay* and that he had examined the deposition before he concluded that the Smith deposition ought to be admitted. He further held that any differences in the interests of the defendants here and the defendants in *DeRocco* was a matter of degree but did not affect his decision that they were sufficiently similar to justify the use of the Smith deposition.

[7] We might normally be concerned with the ruling of the tral judge here. We do not view our decision in *Clay* as establishing the admissibility of Dr. Smith's deposition for all purposes in all asbestos cases. *Clay* did not rule the deposition admissible as a matter of law. It only held that it was the type of deposition which was subject to the application of Rule 804(b)(1), and thus should have been admissible under the particular facts in *Clay*. While we agree with *Clay* that a realistic application of the rule is to be preferred over one which is formalistically grudging, we believe also that the preferred approach in determining admissibility is for the attorneys to present to the court and for the court to consider the circumstances under which the original deposition was taken so that a full understanding of the motives in the first case can be obtained. Some of the motives of the defendants can be understood from the very limited cross-examination which appears in the Smith deposition, but very little otherwise is shown in our record or is shown either in *Clay* or in *Murphy*.

[8] What is more important, however, is the question of potential prejudice that can accrue to a defendant against whom a deposition is introduced which the defendant never had an opportunity to adequately refute. Under such circumstances, we think it is incumbent upon counsel for the defendant when objecting to the admissibility of such proof to explain as clearly as possible to the judge precisely why the motive and opportunity of the defendants in the first case was not adequate to develop the cross-examination which the instant defendant would have presented to the witness. Thus, we would have been much more impressed with the defense's objections had they articulated before the trial court in the first instance, and later before us, precisely what lines of questioning

they would have pursued. While National Gypsum here points to certain areas of difference between its situation and that of Johns-Manville, much of its argument before us was not presented to the district court, nor are we told precisely what lines of questioning National Gypsum would have pursued had it had the opportunity. We do not doubt that the trial judge here understood that he was not bound as a matter of law to admit the document in every case and we do not doubt he would have carefully considered any such factors, if they existed and had been pointed out to him at the time. We believe that it was the responsibility of National Gypsum to make this showing in the district court if it wished later to seek a retrial in which the evidence was to be excluded.

We further comment that we are aware of the great risk which might normally attend the use of a deposition of an expert who is no longer available for cross-examination. Expert witnesses all too often may be obtained on any subject and may speak with great authority and express opinions very wide in scope. When they are not adequately cross-examined, even though an opportunity is present, experts are often prone to create too heavy an aura of authoritativeness. Further, it should rarely be necessary to use the purely opinion testimony of an expert who testified in an entirely different case; and the dangers are correspondingly great that, where there exists a wide variety of opinion, an alert attorney may simply search out expert testimony which he conceives to be favorable to his cause and which he knows to have been made by a witness who is no longer, through death or otherwise, available to testify. Obviously, Rule 803 is not designed to deprive the opposite party of the historic right of cross-examination; rather, it is intended to permit parties to employ proof and testimony which is essentially reliable.

cannot be effectively obtained in any other manner, and whose relevancy and probity is such that its introduction outweighs the possible prejudicial value which may result from denying cross-examination.

[9] Here, the testimony of Dr. Smith is not so much the testimony of any expert who is giving opinions, as it is the testimony of a very knowledgeable person who was aware of the historical development of the specialized subject matter under examination. We believe that the very limited cross-examination of which the counsel in the original *DeRocco* case availed itself reflects its correct conclusion that most of Dr. Smith's testimony did relate to historical facts and was of a type which was not subject to refutation. Indeed, nothing in the argument before us or before the district court challenges the accuracy of the historical statements made by Dr. Smith, and for this additional reason we believe it was not an abuse of discretion for the trial judge here to have admitted the deposition. As observed by Judge Kennedy, "Smith, as former Medical Director of the leading manufacturer of asbestos-containing products, was in a unique position to discuss the scope of knowledge available to the industry during his 20-year tenure at Johns-Manville." *Murphy*, 779 F.2d at 343.

National Gypsum also challenges the admission by the district court of documents created after 1967, the last possible date on which Mr. Dykes was exposed to asbestos. The district court admitted these documents "only to determine whether combined with other evidence in the case or standing alone they demonstrate that National Gypsum is liable for punitive damages for its activities before 1967." The documents seek to bolster plaintiffs' claim that National Gypsum suppressed information about

asbestos dangers. They include several letters from safety officials at National Gypsum which imply opposition to printing safety labels and a desire to dilute the language in a pamphlet proposed by Johns-Manville entitled "Recommended Health Safety Practices." These documents were created between 1968 and 1978. National Gypsum's argument is that these post-injury documents are not relevant to National Gypsum's knowledge of asbestos dangers prior to 1968.

[10] We disagree with the argument advanced by National Gypsum that the case law establishes a uniform rule barring such evidence.[3] Rather, we believe that the cases reflect a case-by-case approach in ascertaining whether post-injury evidence is relevant to defendant's culpability. Evidence is relevant if it tends to make the existence of any fact that is of consequence to the action more probable than not, Fed.R.Evid. 401, and absent some statutory or common law bar the trial judge's ruling on relevancy will not be disturbed unless based on an abuse of discretion. *See* Weinstein's Evidence ¶ 401[01] n. 4 (compiling cases). It does not logically follow simply because the proffered evidence seeks to establish some act occurring after the injury that the evidence cannot make the fact of the pre-injury conduct more probable than not. *See* 2 Wigmore, Evidence § 437 (Chadbourne rev. 1979). The district court stated its reasons for allowing the jury to examine these documents if and when they reach the issue of punitive damages:

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3. The cases relied upon for this proposition are *Litton Systems, Inc. v. A.T. & T. Co.*, 700 F.2d 785 (2d Cir.1983); *Arceneaux v. Texaco, Inc.*, 623 F.2d 924 (5th Cir.1980); *Beard v. Mitchell*, 604 F.2d 485 (7th Cir.1979); *Johnson v. Husky Industries, Inc.*, 536 F.2d 645 (6th Cir.1976); and *Thomas v. American Cytoscope Makers, Inc.*, 414 F.Supp. 255 (E.D.Pa.1976).

> Thus, the issue, as we viewed it at trial and as we view it today, is this. There was substantial circustantial [sic] evidence that defendant knew or should have known that its asbestos-containing products constituted a significant potential health hazard during the period in which plaintiff's decedent used them. However, defendant took no steps to explore or cure that hazard during that period. However, *after the exposure period,* defendant generated a wealth of documents which demonstrate that it wished to avoid dealing with the problem, and which, we concluded in a document-by-document review, circumstantially demonstrated that defendant's attitude as reflected therein was *consistent with its position of nonactivity during the period of plaintiffs' exposure.* Did, then, the fortuity of plaintiff's decedent's having stopped using National Gypsum products prevent the jury from considering whether the later-generated documents provided a basis for inferring that defendant acted wilfully or recklessly during the exposure period?

Dykes v. National Gypsum Co., slip op. at 18 (emphasis added).

[11] This passage shows that the district court examined the post-injury documents and concluded that some foundation for their admission was established, i.e., an attitude consistent with that which the plaintiffs claim existed prior to the injury. Since this foundation was established, we cannot say that the trial court abused its discretion in admitting the documents on the issue of punitive damages.

C. *Prejudicially marked exhibits.*

[12] Portions of the above-mentioned exhibits were read to the jury during the trial. These portions were highlighted in yellow marker and sent into the jury room marked "Admitted for punitive damages only." In his final instructions the district judge informed the jury of the purpose of the post-1967 evidence; that it was admitted to show that National Gypsum was or should have been aware of the hazards of asbestos, that the jury should consider other evidence to establish punitive damages, and that the post-1967 documents were offered to show pre-1967 conduct. National Gypsum argues that the documents were unduly suggestive and that the trial judge erroneously relied upon Fed.R.Evid. 1006 for their admissibility in that form.

We find no abuse of discretion in the procedure used by the district court. The judge explained, "The douments were voluminous, and the highlighting simply served to bring to the jury's attention those portions of the documents relevant to their deliberation." *Dykes*, slip op. at 20. The judge's instruction clarified for the jurors the reason the documents were separated from the other evidence admitted in the case as well as the reason they were marked in yellow. Also, it is not clear that the trial judge relied upon Rule 1006, he refers to it by analogy as other authority for the admission of summarized evidence. Admission of the documents in this manner was not reversible error.

D. *Availability of punitive damages in asbestos cases.*

[13] National Gypsum urges the court to accept the "overkill doctrine" accepted by some courts in asbestos cases. This theory holds that successive compensatory

awards are sufficient to achieve the exemplary and punitive purpose, so that allowing successive punitive awards only creates overkill and threatens the recovery of any award by subsequent plaintiffs. *See Jackson v. Johns-Manville Sales Corp.*, 727 F.2d 506 (5th Cir.1984) (applying Mississippi law).

This court has recently rejected this theory as it pertains to Tennessee law, *Cathey v. Johns-Manville Sales Corp.*, 776 F.2d 1565 (6th Cir.1985), and we are bound thereby. Therefore, we reject the theory that punitive damages are not available in Tennessee in asbestos cases.

CONCLUSION

We conclude that the trial court correctly admitted the deposition of Dr. Kenneth Wallace Smith and the post-1967 evidence. We also conclude that the exhibits marked "For punitive damages only" were not prejudicial. However, we disagree with the trial court's ruling that Tennessee's Contribution Among Tort-Feasors Act does not apply to punitive damages based upon willful and wanton conduct. We therefore remand this case to the trial court for application of the Contribution Among Tort-Feasors Act to the punitive portion of the award.

(Filed May 29, 1984)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

Case No. 3-83-382

HELEN K. DYKES, Individually, and as Widow for the Use and Benefit of Herself and the Next of Kin of EULIS S. DYKES, Deceased,
Plaintiff,

-vs-

NATIONAL GYPSUM COMPANY,
Defendant.

MEMORANDUM AND ORDER

PORTER, S.J.:*

I. *Introduction*

The jury in this asbestos case returned a verdict totalling $500,000.00 against defendant National Gypsum Company. The jury awarded $200,000.00 for the wrongful death of plaintiff's decedent, Eulis Dykes, $100,000.00 for plaintiff Helen Dykes's loss of consortium, and $200,000.00 in punitive damages. The case is now before the Court on a number of post-trial motions filed by the parties. These are plaintiff's motion for additur or for a new trial on damages, defendant's motion to amend the judgment or, alternatively, to show the judgment satisfied in full,

*The Honorable David S. Porter, United States Senior District Judge, Southern District of Ohio, Western Division, sitting by designation.

defendant's motion for judgment notwithstanding a verdict as to punitive damages, and defendant's motion for a new trial. These motions will be addressed *seriatim* following a brief review of the facts as developed at trial.

II. *Factual Background*

Eulis Dykes was, from 1947 through the mid-1960s, a plasterer employed by Gilbert Plastering Company in Knoxville, Tennessee. He was, by all accounts, the premier plasterer in the area; as such, he was called upon to use a spray gun method of plaster application when the method was developed. The spray process primarily involved using an applicator attached to a hose which was in turn immersed in liquid plaster. There was ample evidence from which the jury could conclude that the business of spraying plaster generated large amounts of airborne particulate dust, albeit encapsulated in water during the actual application process.

A significant amount of the plaster which Mr. Dykes applied by the spray method was "acoustical" plaster, designed, as we understand it, to dampen the resonance of surfaces to which it was applied. Acoustical plaster contains a percentage of asbestos fiber.

As originally filed, this action named 16 manufacturers of asbestos-containing products as defendants. By the time *voir dire* began, 12 of these defendants had settled with plaintiff, so the jury was initially exposed to four defendants. By opening statement, two more had settled, and shortly after trial began, only National Gypsum was left as defendant.

National Gypsum manufactured one acoustical plaster product, Gold Bond Sprayolite. The testimony established that Sprayolite was not the preferred acoustical

plaster product used by plaintiff's employer; his employer apparently did not like certain qualities of the product, and only used it when it was specified by the architect or customers, *e.g.*, Holiday Inns. However, there was testimony sufficient to establish that Mr. Dykes applied Sprayolite on at least three large projects, and there was additional testimony that he and his coworkers believed that there were additional Sprayolite jobs which they could not recall.

As noted, Mr. Dykes's career as a full-time plasterer lasted until approximately 1965. At that time, he went to work for Union Carbide Corporation at its facilities in Oak Ridge, Tennessee. His position at Oak Ridge was that of utility mechanic. As such, he came into contact with a wide variety of asbestos-containing products by virtue of his duties of ripping out and replacing asbestos pipe insulation and asbestos boiler linings, and doing occasional acoustical-plaster patchwork.

Mr. Dykes's years at Union Carbide ended in early 1982, when he was diagnosed as having a type of cancer known as mesothelioma. A definition of mesothelioma, borne out at trial, is found in *Insurance Company of North America v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212, 1214 n.1 (6th Cir. 1980):

> Mesothelioma is cancer of the mesothelial cells which line the chest wall and surround the organs of the chest cavity. This cancer is associated with the inhalation of asbestos fibers. Mesothelioma generally does not occur until 20 years or more after there has been excessive inhalation of asbestos. Mesothelioma is easily discovered and diagnosed shortly after it develops. Unfortunately, there is no satisfactory treat-

ment for the disease, and the victim almost always dies within several years of the tumor's initial development.

Mr. Dykes died from complications associated with the mesothelioma in late November, 1983. There was no disagreement among the parties as to the correctness of the diagnosis or the cause of his death.

a.

The parties have represented to the Court that this case is unique in two ways. We are told that this is the first case to come to trial in which the plaintiff was a plasterer, as opposed to, *e.g.*, an insulation worker, for much of the relevant exposure period. Additionally, this was one of the first cases in which the so-called "fiber defense" was relevant to the jury's determination of the facts.

The significance of the fact that plaintiff was a plasterer faded quickly at trial. The plaster manufacturing defendants initially asserted that little or no plaster dust became airborne during application because plaster is encapsulated in water droplets which both prevent circulation and prevent inhalation of fibers. However, the evidence at trial overwhelmingly demonstrated that plaintiff was exposed to significant amounts of asbestos-containing plaster dust while he was a plaster sprayer.

The "fiber defense" is both more complex and more factually relevant hereto. There was expert testimony to the effect that there are three primary types of asbestos fibers used in products manufactured in America: chrysotile asbestos, amocite asbestos, and crocidolite asbestos. Sprayolite, and apparently all other acoustical plasters, contain chrysotile asbestos. While chrysotile asbestos is

unequivocally linked to pneumoconeosis, commonly known as asbestosis, the linchpin of National Gypsum's defense was that the current thinking of those in the fore of asbestos research is that chrysotile asbestos does not cause mesothelioma. Similarly, defendant sought to establish that it had no reason to believe, during the relevant period, that chrysotile asbestos was pathogenically related to mesothelioma.

Both plaintiff and defendant presented testimony from recognized experts to espouse their positions of the fiber defense. A jury question was raised as to the question, whether or not chrysotile asbestos fibers cause mesothelioma, which question the jury obviously answered in the affirmative. In addition, as to the standard to be applied in determining what National Gypsum knew or should have known, the Court determined that the appropriate standard was not the specific one, that is whether or not defendant knew or should have known that exposure to chrysotile asbestos fibers could cause mesothelioma. Rather, the question, in the context of the disputed testimony that there was no chrysotile-mesothelioma link, was twofold. First, did chrysotile asbestos in fact cause or contribute to Mr. Dykes's illness and death? If it did, should defendant have known that asbestos exposure caused illness and acted accordingly? In other words, while a jury question existed as to whether chrysotile *could cause* the illness, the jury was not given the question, whether or not liability was contingent upon knowledge of specific characteristics of various asbestos fiber types.

We note that the evidence in this case as to the knowledge of the medical community with regard to asbestos-related health problems distinctly parallelled that

summarized by the court in *Moran v. Johns-Manville Sales Corp.*, 691 F.2d 811, 814-16 (6th Cir. 1982). As to the knowledge of this defendant regarding asbestos health hazards, we note several relevant considerations. First, National Gypsum owned, in the middle years of this century, a chrysotile asbestos mining facility in Canada, and was a participant in a Canadian asbestos mining industry council. It also owned an African asbestos mine. In this country, defendant had several asbestos-containing product manufacturing facilities, and made a wide range of asbestos-containing building supplies through its Gold Bond Building Products Division. Domestically, National Gypsum participated in asbestos manufacturers' industry groups, symposia, and conferences, and National Gypsum's medical officer was a personal friend of Dr. Kenneth Wallace Smith, whose own early-developed position as to the significance of the knowledge of the asbestos industry as to health hazards was summarized in *Clay v. Johns-Manville Sales Corp.*, 722 F.2d 1289, 1294 (6th Cir. 1983) and *Moran*, 691 F.2d at 814.

There was, therefore, evidence which supported the inference that National Gypsum, as a major producer of asbestos-containing products, had as much knowledge of the health hazards posed by prolonged asbestos exposure as any other manufacturer, and had such knowledge as early as anyone else.

b.

An issue emerged at trial which had not been raised by either party ahead of time, despite the fact that an unusually large number of pretrial conferences occurred. In discovery, plaintiffs obtained a number of documents from National Gypsum's corporate files. Each document

concerned National Gypsum's understanding of the health hazards of asbestos, and most were claimed to reflect the attitude of National Gypsum's corporate management regarding attempts within and outside the industry to address the problem by way of warnings, informational literature, regulatory schemes, and the like. These documents tended to show that National Gypsum was quite reluctant to institute any program or policy which might adversely affect use of asbestos-containing products because of potential marketing problems.

These documents were not generated until 1967 and later, that fact gave rise to strenuous objection to their admission. Plaintiff's exposure to National Gypsum acoustical plaster ceased in 1965 or '66. Thus, when plaintiff offered the post-1967 exhibits at trial, defendant objected on the ground that because the documents were not generated until after the "relationship" between National Gypsum and Eulis Dykes had ended, the documents were irrelevant and hence inadmissible.

The Court agreed with defendant that the challenged records were not admissible on the issue of plaintiff's entitlement to compensatory damages, i.e., to whether or not National Gypsum was, in the first instance, liable to plaintiff. However, we determined that the documents were admissible on the issue of punitive damages. The jury was charged as follows:

> I am now going to instruct you as to the permissible use of the post-1967 documents submitted by plaintiff on the issue of punitive damages.
>
> As you know, plaintiff submits that those documents tend to show that National Gypsum is subject to punitive liability because it allegedly deliberately

and recklessly failed to act once it was or should have been aware of the alleged hazards of asbestos. Of course, National Gypsum denies that.

You may consider the post-1967 documents only to determine whether, combined with other evidence in the case or standing alone, they demonstrate that National Gypsum is liable for punitive damages for its activities *before* 1967.

To put this a different way, defendant can only be liable for punitive damages in this case for its activities during the period in which Eulis Dykes was exposed to its products. However, plaintiff was permitted to introduce these documents because she believes that they support the inference that, prior to 1967, defendant acted wrongfully. This is, of course, for your consideration and determination alone.

Tr. ..... (emphasis in original).[2]

As noted above, the jury, after lengthy deliberation, returned a verdict totalling $500,000.00 of which $200,000.00 constituted punitive damages.

III. *Plaintiff's Motion for Additur*

We now turn to the motions at bar. We first consider plaintiff's motion for additur or for a new trial on damages. Plaintiff argues that because the amount of compensatory damages assessed by the jury was, in her estimation, inadequate to fully compensate her losses, she is entitled either to additional damages as a matter of law, or to a new trial on the matter.

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2. We are, at this writing, without benefit of the transcript of the trial herein. The quoted charge comes from the Court's copy, from which it read.

Specifically, she asserts that

> [t]he jury apparently did not consider the unequivocal proof that the plaintiff's deceased was a very healthy man before he developed cancer, 'hard as nails' in the words of witness Oliven Williams, that he had been very healthy all of his life and had never missed any work from poor health. They did not consider that he was a sober person and very industrious as the proof unequivocally showed. Neither did they consider the pain and suffering he had from asbestosis and cancer, including his mental suffering from the knowledge that he was dying of cancer, as well as the physical pain and suffering he endured for almost two years until his death.

Plaintiff's Motion for Additur, etc. at 4-5.

As a second ground for her motion, plaintiff asserts that the Court erred in refusing to permit a four and one-half minute videotape of plaintiff on his deathbed, particularly because the jury had been informed during *voir dire* that they would see such a tape. This claim seeks simply to relitigate a matter extensively considered at trial, and we reaffirm our conclusion that the tape was cumulative and unnecessarily prejudicial. Rule 403, Fed. R. Evid.

Finally, plaintiff's counsel has submitted an affidavit to the effect that he was approached by a juror in the hall following return of the verdict and that the juror made statements which indicated to counsel that the jury either failed to understand or declined to follow the Court's instruction as to defendant's liabiilty for the full measure of damages proven by plaintiff.

Plaintiff's motion is denied. As to the asserted failure of the jury to follow the Court's instructions,

> [t]he function of the reviewing court with respect to jury instructions is to satisfy itself that the instructions show no tendency to confuse or mislead the jury with respect to the applicable principles of law. The jury is presumed to have followed the instructions correctly as given.

Miller v. Utica Mill Specialty Machinery Company, Incorporated, ... F.2d ....., No. 82-5750 (6th Cir., March 6, 1984) (Slip Op. at 3). *See also Moran,* 691 F.2d at 813; Rule 606, Fed. R. Evid.

Here, the charge as given properly stated the law regarding joint and several liabality; while highsight may suggest that a more strongly worded charge may have been appropriate, we conclude both that the charge was proper and that the jury is presumed to have followed it. We note that there was no motion by either side for a mistrial following the attrition of the defendants who were present at the beginning of *voir dire* but later settled their claims. Nor was there such a motion when the jury learned how many defendants were originally reached. The fact that those defendants were no longer present—and that it was, therefore, apparent that National Gypsum was not the only party which plaintiff had sought to hold liable—was one which concerned plaintiff's counsel and the Court during trial. However, we cannot accept, as a basis for impeaching the jury's verdict, counsel's assertion that the jury failed to follow a charge properly drawn.

As to whether or not the jury properly considered the litany of damage factors recited by plaintiff, we simply state our abiding faith in the wisdom of juries, and decline to tamper with their judgment, noting too that plaintiff cites no authority, and we have found none which is persuasive, for the proposition that a federal court sitting in

diversity may suggest an additur in lieu of a new trial. *See Dimick v. Scheidt*, 293 U.S. 474 (1935). We decline to follow, for the reasons set forth in defendant's response to plaintiff's motion, *McCoy v. Wean United, Inc.*, 67 F.R.D. 495 (E.D. Tenn. 1975) (Neese, J.) (granting additur request).

IV. *National Gypsum's Motion to Amend Judgment, etc.*

The gravamen of that motion is that because plaintiff obtained in settlement from other defendants an amount greater than the amount awarded by the jury against National Gypsum, defendant is entitled to have the full amount of the judgment against it offset against the settlements under the Tennessee Uniform Contribution Among Joint Tort-Feasors Act, Tenn. Code Ann. § 29-11-101 *et seq.* (1968).

a.

The first section of the Act relevant to our determination of defendant's motion is Tenn. Code Ann. § 29-11-105 (1), which provides that a covenant not to sue given to one or more joint tortfeasors

> does not discharge any of the other tort-feasors from liability . . . unless its terms so provide; but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater[.]

Plaintiff appears not to dispute defendant's claim for reduction of the judgment by the amount of the compensatory damages award, that being $300,000.00, and the statute and cases appear to require setoff of that amount.

See Tenn. Code Ann. § 29-11-105(1); *Yett v. Smoky Mountain Aviation, Inc.*, 555 S.W.2d 867 (Tenn. App.), *cert. denied*, (Tenn.) (1977). However, she argues that setoff of the punitive damages award is contrary to both law and logic, noting that "the conduct of [National Gypsum] has been found to require the payment of the penalty" reflected in an award of punitive damages, and the "policy justifying this penalty would be thwarted if it could be avoided either wholly or partially by payment for settlement by others."

As originally proposed by the drafters, the Uniform Contribution Among Tortfeasors Act provided that:

> There is no right of contribution in favor of any tort-feasor who has intentionally [wilfully or wantonly] caused or contributed to the injury or wrongful death.

Unif. Contribution Among Tortfeasors Act, § 1(c), 12 U.L.A. 63 (1975). However, as adopted by the Tennessee Legislature in 1968, the bracketed words were omitted, so that Tenn. Code Ann. § 29-11-102(c) provides only that

> [t]here is no right of contribution in favor of any tort-feasor who has intentionally caused or contributed to the injury or wrongful death.

b.

Defendant, then asserts that the intention of the legislature to insulate only intentional—as opposed to wilful and wanton—torts from contribution is demonstrated by the omission of the bracketed language of language in Tenn. Code Ann. § 29-11-102(c), as well as by the rule in Tennessee that "injury from gross negligence or wanton negligence is not the same as an intentional injury." *Gen-*

eral Casulty Company of America v. Woodby, 238 F.2d 452, 458 (6th Cir. 1956) (applying Tennessee law of insurance coverage). Plaintiff, on the other hand, argues that it is not the caliber of the tort, *per se,* which determines the applicability of the contribution statute, but rather the nature of the damages awarded, noting that punitive damages are "to punish a defendant, or to deter him from committing acts of a similar nature, and to make a public example of him." *Tipton City Board of Education v. Tipton,* 561 S.W.2d 148, 152 (Tenn. 1978) (also noting that punitive damages are "in addition to" compensatory damages, *id.*).

In analyzing this assertion, we note that cases decided by federal courts in Tennessee prior to passage of the contribution statute determined that a defendant who had been adjudged guilty of wilful or wanton conduct was not entitled to contribution from settling defendants or codefendants. *See Southern Railway Co. v. Foote Mineral Co.,* 384 F.2d 224, 227 (6th Cir. 1967) (under Tennessee law, "there can be no recovery of contribution if the party seeking it was guilty of gross negligence"); *Huggins v. Graves,* 210 F. Supp. 98, 103 (E.D. Tenn. 1962) ("the right of contribution exists under Tennessee as between joint tortfeasors in a negligence action in the absence of willful or wanton negligence upon the part of the party seeking contribution"). *See also Dixie Portland Flour Mills, Inc. v. Dixie Feed & Seed Co.,* 272 F. Supp. 826, 830 (W.D. Tenn. 1967) (Bailey Brown, C.J.) ("the right to . . . contribution between *negligent* joint tortfeasors is well established in Tennessee law.") (Emphasis supplied.)

We also not that, as a practical matter, an award of punitive damages is, by its nature, based upon the conduct of the particular defendant against whom it is levied by

the jury. It goes without saying that none of the settlements entered into by plaintiff contemplated apportionment of part of the amount paid for punitive damages; thus, National Gypsum is clearly the only defendant in this case who is liable for any punitive damages. We perceive a fundamental inequity in permitting a defendant who has been adjudged guilty of wanton conduct to wholly escape payment of damages because its codefendants early assessed their exposure and chose to enter into settlements.

Given these considerations, our inquiry today is whether or not the Tennessee legislature in enacting the contribution statutes sought both to overrule prior judicial interpretation of Tennessee law on the subject and enact a rule of law which leads to a result which is, in our view, inequitable.

c.

After consideration of the parties' arguments, we conclude as follows. There was no allegation, much less finding, in this case that the defendant was guilty of an intentional tort. Therefore, contribution is mandated by Tenn. Code Ann. § 29-11-105(1) as to that portion of the jury's award to plaintiff which represents the joint and several liability of all original defendants herein. We can envision no situation however, in which an award of punitive damages levied specifically against a lone defendant can be considered the responsibility of any other defendants. Indeed, had trial proceeded against additional defendants, the jury would have been required to examine the potential liability for punitive damages of each defendant individually where the evidence merited such consideration, just as the punitive award herein was directed solely to National Gypsum. We therefore conclude that awards of punitive damages are simply outside

the purview of the Tennessee statute, and thus decline to reduce the punitive damages awarded by the jury.[3]

This result achieves, we believe, the dual purpose of advancing the purpose of the contribution statute to avoid double recovery for a single injury, while avoiding the evisceration of the policy behind permitting punitive damages which would occur were they subject to the setoff sought by National Gypsum.[4]

V. *National Gypsum's Motion for a New Trial*

The new trial motion assigns seven errors, six of which pertain to the Court's decision to permit the issue of punitive damages, and particularly the post-1967 documents, to go to the jury. Before addressing the specifics of the motion, which we will do only briefly, we set out the rationale under which the post-1967 documents were admitted into evidence at trial.

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3. We have also considered defendant's assertion in reply that although other states do not permit contribution to apply to punitive damage awards, the omission of the "wilfull and wanton" wording from the Tennessee statute, combined with the fact that in Tennessee, insurers are bound to indemnify their insureds for awards of punitive, as well as compensatory, damages, setoff should be granted as to the punitive award. However, defendant has not cited us to a case so holding, and we cannot conclude that the Tennessee courts, if faced with the situation at bar, would permit offset of a punitive award based upon reference to insurance coverage cases.

4. We have no difficulty in imagining a situation in which the rule urged by defendant would cause absurd results. If one of a number of defendants views its own conduct as the most egregious among the defendants, and the others settle, then the remaining defendant—despite the seriousness of its offense—would have more motivation to go to trial than to arrive at its own settlement, if it believed that the total damages, including those designed to punish its own conduct specifically, would be little or no more than the amounts paid in compromise. Such a rule would simply serve no purpose except to permit those liable for punitive damages to wholly escape the consequences of their actions.

a.

National Gypsum concedes that, by at least 1952, it had knowledge that, under certain circumstances, asbestos exposure posed a significant health hazard to workers. Furthermore, the jury could readily have found from the evidence, including the deposition of Dr. Kenneth Smith, that National Gypsum knew or should have known that asbestos posed significant health hazards as early as the mid-1930s.[5] However, for reasons of its own, National Gypsum took no steps to limit the potential hazards caused by its products or to warn those exposed thereto until the early to mid-1970s. The post-1967 documents, read most favorably to plaintiff, tended to show that National Gypsum was extremely reluctant either to acknowledge the hazards posed by asbestos or to join in efforts to inform the public or asbestos workers of the hazards involved with long-term asbestos exposure.

b.

Juxtaposed against this background is the fact that Eulis Dykes was not exposed to any asbestos-containing

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5. One of the errors claimed by defendant to have occurred at trial is the admission, over objection, of the deposition of Dr. Smith. The deposition was taken in an asbestos case to which National Gypsum was not a defendant. However, the deposition was admitted in this case because we concluded that the asbestos products manufacturers who cross-examined Dr. Smith in the deposition "had a similar motive in confronting Dr. Smith's testimony, both in terms of appropriate objections and searching cross-examination, to that which [National Gypsum] has in the current litigation." *Clay*, 722 F.2d at 1295. The deposition was therefore determined to be admissible pursuant to Rule 804(b)(1), Fed. R. Evid. As to the relevance of Dr. Smith's testimony to the issue of National Gypsum's knowledge of asbestos health hazards, we note that the medical director of National Gypsum was a personal friend of Dr. Smith and participated in many industry-related activities with him. This footnote disposes of defendant's fifth stated ground for a new trial, as we conclude that the balance required by Rule 403, Fed. R. Evid., under which defendant moves, does not work to defendant's favor.

products manufactured by National Gypsum after 1967. Thus, the issue, as we viewed it at trial and as we view it today, is this. There was substantial circumstantial evidence that defendant knew or should have known that its asbestos-containing products constituted a significant potential health hazard during the period in which plaintiff's decedent used them. However, defendant took no steps to explore or cure that hazard during that period. However, after the exposure period, defendant generated a wealth of documents which demonstrate that it wished to avoid dealing with the problem, and which, we concluded in a document-by-document review, circumstantially demonstrated that defendant's attitude as reflected therein was consistent with its position of nonactivity during the period of plaintiffs' exposure. Did, then, the fortuity of plaintiff's decedent's having stopped using National Gypsum products prevent the jury from considering whether the later-generated documents provided a basis for inferring that defendant acted wilfully or recklessly during the exposure period? We concluded at trial that it did not, and we abide by that decision here.[6]

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6. National Gypsum submits that its position is supported by *Thomas v. Americn Cytoscope Makers, Inc.*, 414 F.Supp. 255 (E.D. Pa. 1976). There, the court "limited plaintiff's proof . . . to evidence of 'the defendant's conduct vis-a-vis the plaintiff' or in other words, to facts and circumstances up until the time of plaintiff's injury." *Id.* at 264. The court then granted defendant's motion for judgment notwithstanding the verdict as to punitive damages. *Id.* at 265-66. We acknowledge that Senior Judge Davis's conclusion appears to be different from our own, although here the jury was specifically instructed that the only permissible use of the post-1967 evidence was to support the inference as to defendant's conduct during the period of plaintiff's exposure to its product. However, at a minimum, the question is one appropriate for appellate resolution given our conclusion at trial that the evidence was admissible. We note in this regard that precisely the question before us was reserved by the court in *Gillham v. Admiral Corporation*, 523 F.2d 102, 103 (6th Cir. 1975), *cert. denied*, 424 U.S. 913 (1976).

c.

The second error assigned is that the Court gave the jury a cautionary instruction when the post-1967 documents were introduced, which was repeated several times, to the effect that the documents were relevant only to punitive damages and not to liability. We note that the first time this instruction was given, it was with what the Court believed to be the agreement of defense counsel, although counsel then moved for a mistrial based upon the giving of the charge. However, we concluded that the giving of the charge provided the best means of insulating the documents from spilling over into the liability determination, and gave it on that ground.

d.

The third error assigned is the fact that the post-1967 documents were permitted to go to the jury room with certain passages highlighted by plaintiff's counsel. This does not present sufficient grounds for a new trial. The documents were voluminous, and the highlighting simply served to bring to the jury's attention those portions of the documents relevant to their deliberations. Had the documents been submitted to the jury with no markings, their task would have been significantly expanded, since they would have had to independently cull out the relevant portions of the documents, and defendant was afforded an opportunity to highlight any portions of the documents it wished. In this regard, we note Rule 1006, Fed. R. Evid., which provides for summary presentation of voluminous documents.

e.

The fourth and sixth errors assigned relate to the manner in which the jury was charged on the punitive

damages issue. These matters were discussed at length during trial. After reviewing defendant's present objections to the charge, we conclude, as we did at trial, that the charge fairly stated the relevant law on punitive damages.

Defendant complains that the charge failed to include language to the effect that the actions alleged to give rise to punitive liability had to have caused Mr. Dykes's illness and death. While this language was not contained in the punitive damages charge, causation was hotly contested in this case, and the jury had been instructed that liability could only lie in the event that it determined that defendant's actions caused or significantly contributed to plaintiff's decedent's injuries. National Gypsum apapparently believes that the jury felt iself empowered to ignore causation in considering the punitive issue; however, considering the charge as a whole, the jury was clearly instructed that it could not award damages of any sort unless there was a causal relationship between National Gypsum's products, as they were marketed (i.e., without warnings), and Eulis Dykes's death. The language omitted was, therefore, surplusage.

Defendant also complains that the charge failed to instruct the jury that it takes "something far greater than a lack of ordinary care to sustain an award for punitive damages." However, the instruction as given stated that

> [p]unitive damages are only appropriate if plaintiff has proven by a preponderance of the evidence that the defendant's actions with regard to its knowledge as to asbestos hazards were done so recklessly as to imply a disregard of its obligations to society, or were done with a bad motive.

That language adequately described the serious nature of punitive damages, and properly directed the attention of

the jury to the appropriate standard, that is whether or not defendant's actions[7] were socially irresponsible.

f.

The final assignment of error pertains to depositions which had been corrected by the deponents. Defendant contends that

> [t]he Court committed error by allowing the uncorrected portions of the depositions of Mr. Frank H. Zimmerman, Mr. Donald J. Peterson, and Mr. Albert H. Fay to be read to the jury, followed by a reading of the corrections each had made, rather than requiring that only the corrected version be read.

Some factual background is relevant to disposition of this contention. At trial, plaintiff's counsel were, for the first time,[8] informed that the deponents noted above had made changes in the transcripts of their depositions following transcription. The changes were made pursuant to Rule 30(e), Fed. R. Civ. P., which provides that

> [w]hen the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by him, unless such examination and reading are waived by the parties. Any changes in form or substance which the witness de-

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7. Defendant makes much of the fact that it could not only have been shown to have negligently failed to act. This may be analytically sound, since defendant apparently did absolutely nothing to reflect the knowledge it gained over the years regarding asbestos-related health hazards. However, we can only conclude that the jury found that the failure to act in the face of that knowledge was reckless, consistent with the language of the instruction, and we do not disturb that conclusion.

8. We accept counsel's professional representation on this point, as well as defendant's inability to demonstrate that counsel had been served with the corrections.

> sires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness. . . .

Before examining the relevant cases, we note that there is an obvious and fundamental unfairness to permitting a deponent—particularly an employee or former employee of a party, as was the case in each of the depositions in question—to effect substantive changes in a deposition taken for trial purposes. That unfairness is substantially compounded when the changes are not made known to opposing counsel until, in the midst of trial, a copy is provided. Had counsel been apprised of the changes before trial, as would appear to be appropriate, they would have been well within their rights to seek a continuance for the purpose of reconvening the deposition to explore the purposes behind the proffered changes. However, it is simply unreasonable, especially given the extreme difficulty with which this trial was scheduled in the first place, to expect the parties and the Court, and particularly the jury, to adjourn for such purposes.

We further note that the changes proffered did not comply with the terms of Rule 30(e). They were not "entered upon the deposition by the officer;" moveover, many of the changes included only conclusory grounds for alteration. *See Lugtig v. Thomas*, 89 F.R.D. 639, 641 (N.D. Ill. 1981). That being the case, we are far from certain that defendant was entitled to have the changes considered at all.

The position urged by defendant—that a deponent may change his answers at will, and that only the changes are the deposition—makes little sense. Its adoption, partic-

ularly in the circumstances of this case, would foster precisely the kind of surprise that the discovery rules are designed to avoid; moreover, as noted in *Lugtig*, "The Rule is less likely to be abused if the deponent knows that all the circumstances—the original answers as well as the changes and the reasons—will be subject to examination by the trier of fact." *Id.* at 642.

Defendant urges us to order a new trial based upon this assignment of error on the authority of *Rogers v. Roth*, 477 F.2d 1154 (10th Cir. 1973). In that case, the court held that where a deponent's changed answers formed the basis for improper argument by counsel, the trial court commented that the changes were made after consultation with and instruction by the witness's father, and the original answers were presented to the jury without correlative reading of the changes, the combined circumstances merited retrial of the case. *Id.* at 1160.

We do not view *Rogers* as compelling the conclusion that the only alternatives open to a trial court in the situation of changes in deposition answers is either to permit the altered answers to be read unaccompanied by the original answers, or to continue the case in mid-trial so that counsel may travel the countryside redeposing far-flung witnesses. At noted by Wright & Miller,

> [t]he witness who changes his testimony on a material matter between the giving of his deposition and his appearance at trial may be impeached by his former answers, and the cross-examiner and the jury are likely to be keenly interested in the reasons he changed his testimony. There is no apparent reason why the witness who changes his mind between the giving of the deposition and its transcription should stand in any better case. Thus the preferable rule seems to be

> . . . that 'the original answers must of course remain in the record.'

C. Wright & A. Miller, *Federal Practice & Procedure* § 2118 (1970), *citing Usiak v. New York Tank Barge Co.*, 299 F.2d 808 (2d Cir. 1962) and others.[9] In sum, we see no error in the procedure used at trial under the circumstances in in which the matter arose.

VI.

Finally, we deny defendant's motion for judgment notwithstanding the verdict as to punitive damages. It raises no issues not considered in the context of National Gypsum's motion for a new trial, and so we do not discuss it except to refer back to our determination that the evidence of post-1967 activities of defendant was admitted to support the inference of prior misconduct argued by plaintiff.

VIII. *Conclusion*

All pending motions are denied, except that the motion to amend judgment is granted in part and denied in part.

SO ORDERED.

/s/ Davis S. Porter
United States Senior District
Judge

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9. *Rogers v. Roth*, 477 F.2d at 1159, distinguishes *Usiak* on the basis that it "refers only to statements by parties and contains no other holding." *Id.* To the extent that this is true, we believe it appropriate to consider former employees of defendant, discussing matters peculiarly within the purview of their employment, as "parties" for purposes of evaluating the propriety of giving both versions of their testimony to the trier of fact. More to the point, however, the better-reasoned approach seems to be providing both versions while permitting no inappropriate comment by counsel on the fact of the changes. In this regard we note our impression, gained at trial, that counsel for plaintiff handled the matter in exemplary fashion.

(Filed September 15, 1986)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 84-5606

HELEN K. DYKES, Individually and Widow for the Use and Benefit of her and next of kin of Eulis S. Dykes, deceased,

Plaintiff-Appellee,

v.

RAYMARK INDUSTRIES, INC., et al.,
Defendants,

NATIONAL GYPSUM COMPANY,
Defendant-Appellant.

Before: ENGEL and KRUPANSKY, Circuit Judges; and PECK, Senior Circuit Judge.

JUDGMENT

ON APPEAL from the United States District Court for the Eastern District of Tennessee.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF. It is now here ordered and adjudged by this court that the case is remanded for further proceedings consistent with this opinion.

Each party is to bear its own costs on appeal.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk
/s/ John P. Hehman
Clerk

Issued as Mandate: 12/04/86

A True Copy.

Attest:

/s/ Michelle D. Marr
Deputy Clerk

(Filed November 3, 1986)

No. 84-5606

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

HELEN K. DYKES, ETC.,
Plaintiff-Appellee,

v.

RAYMARK INDUSTRIES, INC., ET AL.,
Defendants,

NATIONAL GYPSUM COMPANY,
Defendant-Appellant.

ORDER

BEFORE: ENGEL and KRUPANSKY, Circuit Judges, and PECK, Senior Circuit Judge

Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
John P. Hehman, Clerk

(Filed January 16, 1987)

No. 84-5606

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

HELEN K. DYKES,
Plaintiff-Appellee,

vs.

NATIONAL GYPSUM COMPANY,
Defendant-Appellant.

ORDER

Before: ENGEL, KRUPANSKY, Circuit judges and PECK, Senior Circuit Judge

Upon consideration of the petition for rehearing filed herein by the defendant-appellant, the court concludes that the issues raised therein were fully considered upon the original argument and decision of this case.

It is therefore ORDERED that the petition for rehearing be and it hereby is denied.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk
/s/ Leonard Green
Leonard Green, Chief Deputy

TENNESSEE CODE ANNOTATED

CHAPTER 11
CONTRIBUTION AMONG TORT-FEASORS

29-11-101. Short title. — This chapter may be cited as the "Uniform Contribution Among Tort-Feasors Act." [Acts 1968 (Adj. S.), ch. 575, § 1; T.C.A. § 23-3101.]

29-11-102. Right of contribution among tort-feasors — Exceptions — Subrogation — Indemnity. — (a) Except as otherwise provided in this chapter where two (2) or more persons are jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them; but no right of contribution shall exist where, by virtue of intrafamily immunity, immunity under the workers' compensation laws of the state of Tennessee, or like immunity, a claimant is barred from maintaining a tort action for injury or wrongful death against the party from whom contribution is sought.

(b) The right of contribution exists only in favor of a tort-feasor who has paid more than his pro rata share of the common liability, and his total recovery is limited to the amount paid by him in excess of his pro rata share. No tort-feasor is compelled to make contribution beyond his own pro rata share of the entire liability.

(c) There is no right of contribution in favor of any tort-feasor who has intentionally caused or contributed to the injury or wrongful death.

(d) A tort-feasor who enters into a settlement with a claimant is not entitled to recover contribution from another tort-feasor whose liability for the injury or

wrongful death is not extinguished by the settlement nor in respect to any amount paid in a settlement which is in excess of what was reasonable.

(e) A liability insurer, who by payment has discharged in full or in part the liability of a tort-feasor and has thereby discharged in full its obligation as insurer, may be subrogated to the tort-feasor's right of contribution to the extent of the amount it has paid in excess of the tort-feasor's pro rata share of the common liability. This provision does not limit or impair any right of subrogation or assignment arising from any other relationship and causes of action for contribution or indemnity are fully assignable and transferable.

(f) This chapter does not impair any right of indemnity under existing law. Where one tort-feasor is entitled to indemnity from another, the right of the indemnity obligee is for indemnity and not contribution, and the indemnity obligor is not entitled to contribution from the obligee for any portion of his indemnity obligation.

(g) This chapter shall not apply to breaches of trust or of other fiduciary obligation. [Acts 1968 (Adj. S.), ch. 575, § 2; impl. am. Acts 1980 (Adj. S.), ch. 534, § 1; T.C.A. § 23-3102.]

29-11-103. Determination of pro rata shares. — In determining the pro rata shares of tort-feasors in the entire liability:

(1) Their relative degrees of fault shall not be considered;

(2) If equity requires, the collective liability of some as a group shall constitute a single share; and

(3) Principles of equity applicable to contribution generally shall apply. [Acts 1968 (Adj. S.), ch. 575, § 3; T.C.A., § 23-3103.]

29-11-104. Enforcement of contribution — Procedure — Limitation. — (This section is not applicable to this case).

29-11-105. Effect of release or covenant not to sue upon liability of other tort-feasors. — (a) When a release or covenant not to sue or not to enforce judgment is given in good faith to one (1) or two (2) or more persons liable in tort for the same injury or the same wrongful death:

(1) It does not discharge any of the other tort-feasors from liability for the injury or wrongful death unless its terms so provide; but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and

(2) It discharges the tort-feasor to whom it is given from all liability for contribution to any other tort-feasor.

(b) No evidence of a release or covenant not to sue received by another tort-feasor or payment therefor may be introduced by a defendant at the trial of an action by a claimant for injury or wrongful death, but may be introduced upon motion after judgment to reduce a judgment by the amount stipulated by the release or the covenant or by the amount of the consideration paid for it, whichever is greater. [Acts 1986 (Adj. S.), ch. 575, § 5; T.C.A. § 23-3105.]

29-11-106. Construction of chapter. — This chapter shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states that enact it. [Acts 1968 (Adj. S.), ch. 575, § 6; T.C.A. § 23-3106.]